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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~7117~~ 70-176

ROBERT ROSENSPAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported, but is unofficially reported at 71-1 U.S.T.C. ¶9241 and 27 AFTR 2d 71-706, and is reprinted in Appendix A, *infra*, pp. 1a-15a. The opinion of the United States District

Court for the Eastern District of New York is reported at 316 F. Supp. 194 (E.D.N.Y. 1970) and is reprinted in Appendix B, *infra,* pp. 1b-8b.

Jurisdiction

The judgment of the Court of Appeals (Appendix A, *infra,* pp. 16a-17a) was entered on February 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

The income tax statute requires, as a condition to deductibility, that costs of meals and lodging while on business travel be incurred "away from home." Is this requirement to be tested by reference to the taxpayer's business headquarters or to his permanent place of abode?

Statute Involved

The statute involved is §162(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. §162(a)(2), which provides in pertinent part:

> "Sec. 162. Trade or business expenses. (a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * *
>
> "(2) traveling expenses (including amounts expended for meals and lodging other than amounts which

are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business. * * *"[1]

There are no regulations under section 162(a)(2) directly applicable to the issue here presented.

Statement of the Case

The material facts in this case were stipulated and are as follows:

The taxpayer, a lifelong resident of New York City, was, during the years in issue, a traveling salesman for New York City jewelry manufacturers, working on a commission basis and paying his own travel expenses without reimbursement. His assigned sales territory was in the Middle West.

For some 300 days a year he traveled by automobile through his sales territory, which included approximately 75 cities, where he would stay at hotels and motels and eat at restaurants. He usually spent only one or two nights at each stop.

The taxpayer's duties required him to spend several days in his employers' offices in New York City five or six

1. As applicable to the first of the two taxable years in issue (1962), section 162(a)(2) of the Internal Revenue Code was identical to the above-quoted provision, except that the parenthetical phrase read: "(including the entire amount expended for meals and lodging)." Section 162(a)(2) was amended by section 4 of Public Law 87-834, effective as of January 1, 1963, to read as above. The only purpose of the amendment (including the elimination of the word "entire") was to impose a limitation relating to lavishness or extravagance. Since lavishness or extravagance is not in issue in this proceeding, the amendment to the statute is without relevance.

times a year (a total of about 30 business days a year). His business duties in New York were to bring back and clean up his sample case, check orders coming in, determine what items were moving and recommend changes, assist in the styling of new items, visit manufacturers' display rooms, attend jewelry shows, discuss credit problems of accounts in his territory, discuss business matters with other company personnel, and attend an annual sales staff meeting.

The taxpayer supplied his employers with planned itineraries. His employers sent him business mail at various stops on his sales route. Other parties sent him business mail through either of two addresses shown on his business cards (the address of his New York employer or, by courtesy of one of the customers in his sales territory, the address of that customer) or to the home of his cousin in Cincinnati; such mail was either forwarded to him at some point on his route or held for his return. His employers deposited his checks for drawings and commissions with his bank in New York City.

The taxpayer grew up in Brooklyn and maintained his family home there until 1948, by which time his wife had died and his children had grown up and married. From 1948 through 1964 he used his brother's home in Brooklyn as his personal residential address, kept some of his clothing and other personal belongings there, and sometimes stayed there while in New York. More often, out of a desire not to abuse his brother's welcome, he stayed at a nearby hotel. He generally spent his vacations in Brooklyn, where his children and other relatives resided, and made an effort to return to Brooklyn whenever possible.

The taxpayer registered and voted in National and New York State and City elections as a New York City resident from his brother's residential address, filed Federal and New York State tax returns as a New York City resident from that address, and received his personal mail at that address. His only bank was in New York City. He belonged to a New York City branch of Workmen's Circle and attended its meetings and functions. He held motor vehicle operator's licenses issued by New York and Ohio. In 1961 he changed his automobile registration from New York to Ohio to save money on automobile insurance.

In his 1962 and 1964 income tax returns, the taxpayer deducted his expenditures for meals and lodging while traveling on business in his Middle West sales territory. On audit the Internal Revenue Service disallowed the deductions. The taxpayer paid the resulting tax deficiency and interest in the total amount of $2,007.67, filed a claim for refund which was rejected and thereupon filed suit for refund in the District Court for the Eastern District of New York. The jurisdiction of the District Court was founded on 28 U.S.C. §1346(a)(1). The District Court dismissed the taxpayer's complaint on the merits. The Court of Appeals affirmed.

Reasons for Granting the Writ

I

The decision of the Court of Appeals is in conflict with the decisions of other circuits over the meaning of "home".

The holding of the Court of Appeals below that "home," as used in I.R.C. §162(a)(2), means the taxpayer's place of abode conflicts with decisions of other Circuits which identify "home" with business headquarters:

(1) In *Wills* v. *Commissioner,* 411 F.2d 537, 540 (9th Cir. 1969), the Ninth Circuit held that the "tax home" of a professional baseball player is his "principal place of business," *i.e.,* his "club town."

(2) In *Commissioner* v. *Mooneyhan,* 404 F.2d 522, 528 (6th Cir. 1968), the Sixth Circuit held that the "tax home" of a United States employee assigned to Iran was at his "principal place of employment" in Iran.

(3) "A taxpayer's 'home,' for the purposes of the reimbursed travel expense deduction, is not necessarily the place of his residence. Rather, it is the place of the taxpayer's business." *England* v. *United States,* 345 F.2d 414, 417 (7th Cir. 1965).

(4) "In a tax sense [the word 'home'] is referable to the place where one has his principal place of duty, and where he has an abode while pursuing such duty * * *." *Cockrell* v. *Commissioner,* 321 F.2d 504, 507 (8th Cir. 1963).

(5) In *Bercaw* v. *Commissioner*, 165 F.2d 521, 524 (4th Cir. 1948), the Fourth Circuit held that the "home" of an Army officer was at his "permanent * * * place of duty."

(6) The Court of Appeals for the Third Circuit has affirmed *per curiam* two decisions of the Tax Court holding that "home" means business headquarters. *Coerver* v. *Commissioner*, 297 F.2d 837 (3rd Cir. 1962), aff'g 36 T.C. 252; *Martin* v. *Commissioner*, 295 F.2d 38 (3d Cir. 1961), aff'g T.C. Memo. 1960-217.[2]

In contrast to the above decisions, the Court of Appeals in the decision below, criticizing "the Commissioner's insistence that 'home' means 'business headquarters' " (Appendix A, *infra*, p. 11a), concluded that " 'home' means 'home' " in the ordinary sense (Appendix A, *infra*, p. 15a).[3] The decision below thus creates a clear conflict among the Circuits as to the meaning of statutory language whose nation-wide application should be uniform.

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2. The Commissioner of Internal Revenue has advocated the business headquarters definition ever since 1921, *e.g.*, O.D. 864, 4 C.B. 211 (1921); O.D. 1021, 5 C.B. 174 (1921); G.C.M. 23672, 1943 C.B. 66; I.R.S. Publication 300 (1956); I.R.S. Publication 463 (10-67). The Tax Court has long accepted that definition, *e.g.*, *Raymond F. Kershner*, 14 T.C. 168 (1950); *S.M.R. O'Hara*, 6 T.C. 841 (1946).

3. The Second Circuit thus abandoned its earlier view that "home" means business headquarters. See *O'Toole* v. *Commissioner*, 243 F.2d 302 (2d Cir. 1957); *Carragan* v. *Commissioner*, 197 F.2d 246 (2d Cir. 1952). The *O'Toole* case was cited to this effect by this Court in *Commissioner* v. *Stidger*, 386 U.S. 287, 291 (1967).

II

Certiorari should be granted to resolve the conflicting constructions of this Court's decision in *Commissioner* v. *Stidger*, 386 U.S. 287 (1967).

The Court of Appeals in the decision below said of this Court's decision in *Commissioner* v. *Stidger*, 386 U. S. 287 (1967):

> "the [Supreme] Court reviewed the continuing disagreement among the circuits over the Commissioner's view 'that "home" meant the taxpayer's principal place of business or employment whether or not it coincided with his place of residence,' * * * However, the Court again found it unnecessary either to approve or to disapprove the Commissioner's interpretation of 'home,' since it found that 'in the context of the military taxpayer, the Commissioner's position has a firmer foundation,' 386 U. S. at 292." (Appendix A, *infra*, pp. 10a-11a)

The Courts of Appeals for the Sixth and Ninth Circuits have given *Stidger* a different reading. In recent cases involving civilian taxpayers, they have, in reliance on *Stidger*, accepted the definition of "home" as business headquarters (*Commissioner* v. *Mooneyhan, supra; Wills* v. *Commissioner, supra*) after having formerly rejected it (*Burns* v. *Gray*, 287 F.2d 698, 700 (6th Cir. 1961); *James* v. *United States*, 308 F.2d 204 (9th Cir. 1962)). In so doing, the Sixth Circuit, citing *Stidger*, said "[t]his concept of tax home has received the tacit approval of the Supreme Court" (404 F.2d at 528) and the Ninth Circuit stated that "the Supreme Court held in * * * Stidger * * * that the taxpayer's permanent post of duty was his home for tax purposes" (411 F.2d at 540).

Only this Court can set the conflict over the interpretation of *Stidger* at rest.

III

The question is one of general importance which is being widely litigated and requires an authoritative answer.

The courts have struggled with the definition of "home" in more than 100 cases without settling the issue.[4] The issue is an important one to many of the country's millions of salesmen,[5] and to many other members of our highly mobile business society. Since this is a bread-and-butter issue affecting hundreds of thousands of small taxpayers, it is important that it be answered clearly in the tax return filing instructions. The relevant portion of the instructions for page 2 of the individual income tax return (Form 1040) for 1970 reads: "Meals and Lodging.—These are deductible if you are temporarily away on business at least overnight from the general area where your principal or regular business is located." The Internal Revenue Service publication *Your Federal Income Tax* states: "Your tax home, for travel expense purposes, is your principal place of business, employment, station, or post of duty, regardless of where you maintain your family residence."[6]

The decision below creates uncertainty in disagreeing with the quoted instructions. Action by this Court is required to produce a uniform rule that taxpayers can comply with and revenue agents can enforce.

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4. Commerce Clearing House Stand. Fed. Tax Rep., 1971 Edition, ¶1352.02 through ¶1352.12.

5. The 1960 census counted 3,888,635 salesmen. The 1970 census figure has not been published.

6. I.R.S. Publication 17, 1971 Ed. for Individuals, p. 46.

Six Tax Court judges have joined in our prayer in a recent concurring opinion written by Chief Judge Drennen:

> "In view of the uncertainty and confusion caused by the seemingly inconsistent positions sometimes taken by the lower courts in cases involving this issue, I suggest that either the Supreme Court (which has approached it but backed off on several occasions * * *) or Congress should define more specifically what is meant by the word 'home' when used in the context of travel expenses while away from home in the pursuit of a trade or business."[7]

IV

The conflict is one of substance which requires resolution.

The Court of Appeals in the decision below goes to considerable length in attempting to show that the conflict between the two definitions of "home" is more in reasoning than in result. (Appendix A, *infra*, pp. 12a-14a.) This is partially true—but only partially true. As the Court of Appeals itself concedes, the man who maintains a place of abode but possesses no business headquarters will fare differently under the one definition than under the other. (Appendix A, *infra*, pp. 14a-15a.) And so, we show below, will the man with a business headquarters but no place of abode. Different approaches must be taken under either definition to the tax treatment of (1) the taxpayer who has a principal place of business in one city and a minor place of business in another;[8] (2) the taxpayer who is temporarily employed at a place away from his permanent post of duty;[9]

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7. *Truman C. Tucker,* 55 T.C. , No. 82, announced on February 23, 1971, five days after the opinion below.

8. *E.g., Walter F. Brown,* 13 B.T.A. 832 (1928); Rev. Rul. 55-604, 1955-2 C.B. 49.

9. *E.g., Coburn* v. *Commissioner,* 138 F.2d 763 (2d Cir. 1943).

(3) the taxpayer who is required by law to maintain his residence at a place other than that of his employment;[10] and (4), as we have indicated, to the classification of taxpayers as homeless men.[11]

There will be no certainty in the application of the statute until this Court adopts one or the other of the two basic definitions of "home."

V

An anticipatory word of rebuttal: the duplicate expense heresy.

Since the Solicitor General has thrice unsuccessfully asked this Court to decide that "home" means business headquarters,[12] one might expect that he would enthusiastically welcome this opportunity to renew his request. His enthusiasm may be cooled, however, by the knowledge that he cannot do so without jeopardizing the Government's victory below. Out of concern that this may lead the Solicitor General to argue that this Court should pass up this opportunity to settle the issue on grounds of mootness, we offer an anticipatory word of rebuttal. This brings us to the "duplicate expense" doctrine.

The Ninth Circuit was, prior to its recantation in *Wills* v. *Commissioner, supra,* an adherent to the definition of "home" as fixed place of abode. In *James* v. *United States,*

10. *E.g., Barnhill* v. *Commissioner,* 148 F.2d 913 (4th Cir. 1945).

11. *E.g., Charles G. Gustafson,* 3 T.C. 998 (1944), *acq.,* 1944 C.B. 12.

12. See petitions for certiorari and briefs for the Commissioner in *Commissioner* v. *Flowers,* 326 U.S. 465 (1946), and *Commissioner* v. *Stidger,* 386 U.S. 287 (1967), and brief for the Commissioner in *Peurifoy* v. *Commissioner,* 358 U.S. 59 (1958).

supra, involving an itinerant salesman who had neither a fixed place of abode nor an identifiable business headquarters (and who, therefore, could not have prevailed under either definition of "home"), the Ninth Circuit based its denial of deductions for expenses of meals and lodging while on business travel on the ground that the taxpayer had no fixed place of abode. By taking this approach to the problem—the requirement of a permanent place of abode as a condition to the deduction—the Ninth Circuit formulated the "duplicate expense" doctrine. That doctrine is espoused and succinctly restated by the Second Circuit in the decision below in justification of its reading of the limiting words "away from home" as "away from the taxpayer's permanent residence": "[This] limitation reflects congressional recognition of the rational distinction between the taxpayer with a permanent residence—whose travel costs represent a duplication of expense or at least an incidence of expense which the existence of his permanent residence demonstrates he would not incur absent business compulsion—and the taxpayer without such a residence [citing *James*]." (Appendix A, *infra,* p. 15a)

In considering the "duplicate expense" doctrine, one must bear in mind that the courts cannot find one word of support for it in the legislative history, the regulations, or elsewhere outside the statute itself. The doctrine cannot exist unless it can be drawn out of the statutory words "away from home." The interpretation of those words in terms of place of abode fosters the doctrine as its obvious corollary, but their interpretation in terms of business headquarters destroys it.

In sum, if this Court decides that "home" means business headquarters the "duplicate expense" doctrine will wither away from lack of statutory nourishment, with the result that the taxpayer must prevail. The fact that the Solicitor General would prefer both to establish the definition of "home" as business headquarters and to preserve the Government's victory below does not mean that he should eat his cake and have it too.

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 295—September Term, 1970.

(Argued January 14, 1971 Decided February 18, 1971.)

Docket No. 35100

ROBERT ROSENSPAN,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York, George Rosling, *Judge*, dismissing a complaint in which a traveling salesman sought a refund of income taxes paid in consequence of the disallowance of a deduction for unreimbursed expenses for meals and lodging incurred while traveling on business. Affirmed.

Appendix A

JAMES B. LEWIS, Esq. (Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, and Ira B. Shepard, Esq., New York, New York, of Counsel), *for Plaintiff-Appellant.*

RICHARD FARBER, Attorney, Tax Division, Department of Justice, Washington, D. C. (Johnnie M. Walters, Assistant Attorney General, Meyer Rothwacks and Ann E. Belanger, Attorneys, Tax Division, Washington, D. C., Edward R. Neaher, United States Attorney for the Eastern District of New York, Brooklyn, New York, of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

This appeal is from the dismissal on the merits of an action for refund of income taxes, brought in the District Court for the Eastern District of New York. The taxes were paid as a result of the Commissioner's disallowance of deductions for unreimbursed expenses for meals and lodging, allegedly incurred "while away from home in the pursuit of a trade or business." I.R.C. §162(a)(2), in 1962 and 1964.

Plaintiff, Robert Rosenspan, was a jewelry salesman who worked on a commission basis, paying his own traveling expenses without reimbursement. In 1962 he was employed by one and in 1964 by two New York City jewelry manufacturers. For some 300 days a year he traveled by automobile through an extensive sales territory in the Middle West, where he would stay at hotels and motels and eat at restaurants. Five or six times a year he would return

to New York and spend several days at his employers' offices. There he would perform a variety of services essential to his work—cleaning up his sample case, checking orders, discussing customers' credit problems, recommending changes in stock, attending annual staff meetings, and the like.

Rosenspan had grown in Brooklyn and, during his marriage, had maintained a family home there. After his wife's death in 1948, he abandoned this. From that time through the tax years in question he used his brother's Brooklyn home as a personal residential address, keeping some clothing and other belongings there, and registering, voting, and filing his income tax returns from that address. The stipulation of facts states that, on his trips to New York City, "out of a desire not to abuse his welcome at his brother's home, he stayed more often" at an inn near the John F. Kennedy Airport. It recites also that "he generally spent his annual vacations in Brooklyn, where his children resided, and made an effort to return to Brooklyn whenever possible," but affords no further indication where he stayed on such visits. In 1961 he changed the registration of his automobile from New York to Ohio, giving as his address the address of a cousin in Cincinnati, where he also received mail, in order to obtain cheaper automobile insurance. Rosenspan does not contend that he had a permanent abode or residence in Brooklyn or anywhere else.

The basis for the Commissioner's disallowance of a deduction for Rosenspan's meals and lodging while in his sales territory was that he had no "home" to be "away from" while traveling. Not denying that this would be true if the language of §162(a)(2) were given its ordinary

meaning, Rosenspan claimed that for tax purposes his home was his "business headquarters," to wit, New York City where his employers maintained their offices, and relied upon the Commissioner's long advocacy of this concept of a "tax home," see, e.g., G.C.M. 23672, 1943 Cum. Bull. 66-67. The Commissioner responded that although in most circumstances "home" means "business headquarters," it should be given its natural meaning of a permanent abode or residence for purposes of the problem here presented. Rosenspan says the Commissioner is thus trying to have it both ways.

The provision of the Internal Revenue Code applicable for 1962 read:

> "SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *"

For 1964 the statute remained the same except for the interpolation in the parenthesis after "lodging" of the words "other than amounts which are lavish or extravagant under the circumstances"—a change not relevant in this case.

What is now §162(a)(2) was brought into the tax structure by §214 of the Revenue Act of 1921, 42 Stat. 239. Prior to that date, §214 had permitted the deduction of "ordinary and necessary expenses paid or incurred * * * in carrying on

any trade or business," Revenue Act of 1918, 40 Stat. 1066 (1918), without further specification. In a regulation, the Treasury interpreted the statute to allow deduction of "traveling expenses, including railroad fares, and meals and lodging *in an amount in excess of any expenditures ordinarily required for such purposes when at home.*" T.D. 3101, amending Article 292 of Regulations 45, 3 Cum. Bull. 191 (1920) (emphasis supplied). A formula was provided for determining what expenditures were thus "ordinarily required"; the taxpayer was to compute such items as rent, grocery bills, light, etc. and servant hire for the periods when he was away from home, and divide this by the number of members of his family. Minn. 2688, 4 Cum. Bull. 209-11 (1921). The puzzlement of the man without a home was dealt with in a cryptic pronouncement, O.D. 905, 4 Cum. Bull. 212 (1921):

> Living expenses paid by a single taxpayer who has no home and is continuously employed on the road may not be deducted in computing net income.

The 1921 amendment, inserting what is now §162(a)(2)'s allowance of a deduction for the entire amount of qualified meals and lodging, stemmed from a request of the Treasury based on the difficulty of administering the "excess" provision of its regulation. See *United States* v. *Correll*, 389 U.S. 299, 301 n. 6 (1967). While the taxpayer cites statements of legislators in the 1921 Congress that the amendment would provide "a measure of justice" to commercial travelers,[1] there is nothing to indicate that the members

1. Representative Hawley, a member of the Committee on Ways and Means, 61 Cong. Rec. 5201 (1921); see also the remarks of Senator Walsh, a member of the Committee on Finance, 61 Cong. Rec. 6673 (1921).

making or hearing these remarks were thinking of the unusual situation of the traveler without a home. There is likewise nothing to indicate that the Treasury sought, or that Congress meant to require, any change in the ruling that disallowed deductions for living expenses in such a case. The objective was to eliminate the need for computing the expenses "ordinarily required" at home by a taxpayer who had one, and the words used were appropriate to that end. If we were to make the unlikely assumption that the problem of the homeless commercial traveler ever entered the legislators' minds, the language they adopted was singularly inept to resolve it in the way for which plaintiff contends. Thus, if the literal words of the statute were decisive, the Government would clearly prevail on the simple ground that a taxpayer cannot be "away from home" unless he has a home from which to be away, cf. Haddleton, Traveling Expenses "Away from Home," 17 Tax L. Rev. 261, 263, 286 (1962); 49 Va. L. Rev. 125, 126-28 (1963). Although that is our ultimate conclusion, the Supreme Court has wisely admonished that "More than a dictionary is thus required to understand the provision here involved, and no appeal to the 'plain language' of the section can obviate the need for further statutory construction," *United States* v. *Correll, supra,* 389 U.S. at 304 n. 16. We turn, therefore, in the first instance to the Court's decisions.

The initial Supreme Court decision bearing on our problem is *C.I.R.* v. *Flowers,* 326 U.S. 465 (1946). Flowers, a lawyer, had a "home" in the conventional sense in Jackson, Mississippi, but his principal post of business was at the main office of his employer, the Gulf, Mobile & Ohio

Railroad in Mobile, Alabama. Flowers sought to deduct the cost of transportation for his trips to Mobile and the meal and lodging expenses which he incurred in that city. In upholding the Commissioner's disallowance of these deductions, the Court said that "three conditions must thus be satisfied before a traveling expense deduction may be made" under what was substantially the present statute, 326 U.S. at 470. These were:

> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred "while away from home."
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

It noted that "The meaning of the word 'home' * * * with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation," with the Tax Court and the administrative officials having "consistently defined it as the equivalent of the taxpayer's place of business" and two courts of appeals having rejected that view and "confined the term to the taxpayer's actual residence," 326 U.S. at 471-72. The Court found it "unnecessary here to enter into or to decide this conflict," 326 U.S. at 472. This was because the Tax Court had prop-

erly concluded "that the necessary relationship between the expenditures and the railroad's business was lacking." The railroad's interest was in having Mr. Flowers at its headquarters in Mobile; it "gained nothing" from his decision to continue living in Jackson, 326 U.S. at 472-74; hence, the third condition the *Flowers* Court had enunciated as a prerequisite to deductibility was absent. Mr. Justice Rutledge dissented. He did not believe that when Congress used the word "home," it meant "business headquarters," and thought the case presented no other question, 326 U.S. at 474. The most that Rosenspan can extract from *Flowers* is that it did not decide *against* his contention that the employer's business headquarters is the employee's tax home.

The Court's next venture into this area was in *Peurifoy* v. *C. I. R.*, 358 U.S. 59 (1958). That case dealt with three construction workers employed at a site in Kingston, North Carolina, for periods of 20½, 12½, and 8½ months respectively, who maintained permanent residences elsewhere in the state. The Tax Court had allowed them deductions for board and lodging during the employment at Kingston and expenses in regaining their residences when they left, apparently of their own volition and before completion of the project.[2] The Fourth Circuit had reversed, *C. I. R.* v. *Peurifoy*, 254 F.2d 483 (1957). After having granted certiorari "to consider certain questoins as to the application of §23(a)(1)(A) of the Internal Revenue Code of 1939 raised by the course of decisions in the lower courts since our decision in *Commissioner* v. *Flowers*," 358 U.S. at 59-60, the Court announced in a *per curiam* opinion that it had

2. The Court of Appeals explicitly so found with respect to two of the three, 254 F.2d 483, 485 (4 Cir. 1957).

"found it inappropriate to consider such questions." It read *Flowers* as establishing that "a taxpayer is entitled to deduct unreimbursed travel expenses * * * only when they are required by 'the exigencies of business,' " a "general rule" which the majority seemed to feel would mandate disallowance of the deductions under consideration. However, the Court went on to acknowledge an exception to this rule engrafted by the Tax Court, which would have allowed the claimed deductions if the taxpayer's employment were shown to be "temporary" rather than "indefinite" or "indeterminate." Nevertheless, even within this framework, the majority thought that the Court of Appeals had been justified in holding the Tax Court's finding of temporary employment to be clearly erroneous. Mr. Justice Douglas, joined by Justices Black and Whittaker, dissented. Adopting Mr. Justice Rutledge's position in *Flowers,* they disagreed "with the Commissioner's contention that 'home' is synonymous with the situs of the employer's business." While adhering to "the exigencies of business" test announced in *Flowers,* they thought this requirement was satisfied by the fact that, in view of the impracticability of construction workers' moving their homes from job to job, "the expenses incurred were necessary, not to the business of the contractor for whom the taxpayers worked, but for the taxpayers themselves in order to carry on their chosen trade," 358 U.S. at 62-63 n. 6. While the three dissenting Justices thus rejected the Commissioner's identification of "home" with "the situs of the employer's business," the majority did not adopt it and, so far as our problem is concerned, that matter remained in the state of indecision where *Flowers* had left it.

Appendix A

We come finally to *C.I.R.* v. *Stidger*, 386 U.S. 287 (1967), where the Court sustained the disallowance of the expense for meals incurred by a Marine Corps captain who had been assigned to a base in Japan, while his wife and children—prohibited from accompanying him to that post—remained near his previous duty station in California. After noting that in this case there could be no question of the "direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer," 386 U.S. at 289-90, the Court reviewed the continuing disagreement among the circuits over the Commissioner's view "that 'home' meant the taxpayer's principal place of business or employment whether or not it coincided with his place of residence,"[3] and took note of a ruling of the Board of Tax Appeals that members of Congress could not deduct living expenses incurred in Washington, D.C.,[4] and of Congress' response by enacting a special provision making the legislator's place of residence within the district that he represents his home but limiting the amount of deductible living expenses to $3,000, 66 Stat. 467 (1952), now codified in I.R.C. §162(a). However, the Court again found it unnecessary either to approve or to disapprove the Commissioner's interpretation of "home," since it found that "in the context of the military taxpayer, the Commissioner's

3. Although the opinion lists this circuit as having subscribed to the Commissioner's definition of "home," citing *O'Toole* v. *C.I.R.*, 243 F.2d 302 (2 Cir. 1957), and a sentence in our *per curiam* opinion does read that way, the facts of *O'Toole* presented a typical *Flowers* situation and the *ratio decidendi* was the same as in that case, namely, that "The job, not the taxpayer's pattern of living, must require the traveling expenses," 243 F.2d at 303.

4. *Lindsay* v. *C.I.R.*, 34 B.T.A. 840 (1936). This had long been the Commissioner's position. O.D. 864, 4 Cum. Bull. 211 (1921).

position has a firmer foundation," 386 U.S. at 292. This built "on the terminology employed by the military services to categorize various assignments and tours of duty, and also on the language and policy of the statutory provisions prescribing travel and transportation allowances for military personnel," *id.* The Court particularly stressed "the fact that Congress traditionally has provided a special system of tax-free allowances for military personnel," 386 U.S. at 294. Mr. Justice Douglas, who had written the dissent in *Peurifoy,* again joined by Justice Black and now by Justice Fortas, dissented. He thought it was "clear that home means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable," 386 U.S. at 297.[5] The fact that Congress provides special allowances for military personnel did not, in Justice Douglas' view, call for what he deemed an unnatural reading of §162(a)(2) even in that context.

Proper analysis of the problem has been beclouded, and the Government's position in this case has been made more difficult than it need be, by the Commissioner's insistence that "home" means "business headquarters," despite the Supreme Court's having thrice declined to endorse this, and its rejection by several courts of appeals, see *Flowers* v. *C.I.R.,* 148 F.2d 163 (5 Cir. 1945), *rev'd on other grounds,* 326 U.S. 465 (1946); *United States* v. *LeBlanc,* 278 F.2d 571 (5 Cir. 1960); *Burns* v. *Gray,* 287 F.2d 698 (6 Cir. 1961); *James* v. *United States,* 308 F.2d 204 (9 Cir. 1962). But cf. *C.I.R.* v. *Mooneyhan,* 404 F.2d 522 (6 Cir. 1968),

5. Perhaps more accurately, he should be treated as if he had done so.

cert. denied, 394 U.S. 1001 (1969); *Wills* v. *C.I.R.,* 411 F.2d 537, 540 (9 Cir. 1969). When Congress uses such a nontechnical word in a tax statute, presumably it wants administrators and courts to read it in the way that ordinary people would understand, and not "to draw on some unexpressed spirit outside the bounds of the normal meaning of words," *Addison* v. *Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 617 (1944). The construction which the Commissioner has long advocated not only violates this principle but is unnecessary for the protection of the revenue that he seeks. That purpose is served, without any such distortion of language, by the third condition laid down in *Flowers, supra,* 326 U.S. at 470, namely, "that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer" and that "such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade." These requirements were enough to rule out a deduction for Flowers' lodging and meals while in Mobile even if he was "away from home" while there. The deduction would not have been available to his fellow workers living in that city who obtained similar amenities in their homes or even in the very restaurants that Flowers patronized, and Flowers was no more compelled by business to be away from his home while in Mobile than were other employees of the railroad who lived there.

Since the Commissioner's definition of "home" as "business headquarters" will produce the same result as the third *Flowers* condition in the overwhelming bulk of cases arising under §162(a)(2), courts have often fallen

into the habit of referring to it as a ground or an alternate ground of decision, as this court did in *O'Toole* v. *C.I.R.*, 243 F.2d 302 (1957), see fn. 3. But examination of the string of cases cited by plaintiff as endorsing the "business headquarters" test has revealed almost none, aside from the unique situations involving military personnel considered above, which cannot be explained on the basis that the taxpayer had no permanent residence, or was not away from it, or maintained it in a locale apart from where he regularly worked as a matter of personal choice rather than business necessity.[6] This principle likewise affords a satisfactory rationale for the "temporary" employment cases, see 49 Va. L. Rev., *supra*, at 162-63. When an assignment is truly temporary, it would be unreasonable to expect the taxpayer to move his home, and the expenses are thus compelled by the "exigencies of business"; when the assignment is "indefinite" or "indeterminate," the

6. Whether the "personal choice" principle has not sometimes been pressed too far is another matter. The case of a Congressman, see fn. 4, may have been one such instance. It is also hard to be completely satisfied with the distinction between *Barhill* v. *C.I.R.*, 148 F.2d 913 (4 Cir. 1945), disallowing meals and lodging deductions while in the state capital to justices of the Supreme Court of North Carolina who spent approximately 7 months a year there, but maintained their residences elsewhere, in deference to a custom that, at the time of selection, the justices should be fairly distributed throughout the state, and a decision allowing such a deduction in the case of a justice of the Supreme Court of Louisiana who spent 9 months at the Court's headquarters in New Orleans but who, in contrast to the unwritten North Carolina practice, was required by the state constitution to maintain his residence in his own parish, *United States* v. *LeBlanc*, 278 F.2d 571 (5 Cir. 1960). *England* v. *United States*, 345 F.2d 414 (7 Cir. 1965), *cert. denied*, 382 U.S. 986 (1966), is another case in which the "personal choice" principle scarcely provides a satisfactory basis of decision if it suffices that the expenses be necessary to the taxpayer employee's "trade or business" as distinguished from his employer's. As to this, see the discussion in the text, *infra*.

situation is different and, if the taxpayer decides to leave his home where it was, disallowance is appropriate, not because he has acquired a "tax home" in some lodging house or hotel at the worksite but because his failure to move his home was for his personal convenience and not compelled by business necessity. Under the facts here presented, we need not decide whether in the case of a taxpayer who is not self-employed, the "exigencies of business" which compel the traveling expenses away from home refer solely to the business of his employer or to the business of the taxpayer as well. We note only that the latter contention is surely not foreclosed by decisions to date. See *Peurifoy* v. *C.I.R.*, 358 U.S., *supra*, at 62-63 n. 6 (Douglas, J., dissenting); Rev. Rul. 60-189, 1960-1 Cum. Bull. 60; see generally 49 Va. L. Rev., *supra*, at 136-45; and *Trent* v. *C.I.R.*, 291 F.2d 669, and cases cited, especially at 674 (2 Cir. 1961).

Shifting the thrust of analysis from the search for a fictional "tax home" to a questioning of the business necessity for incurring the expense away from the taxpayer's permanent residence thus does not upset the basic structure of the decisions which have dealt with this problem. Compare 49 Va. L. Rev., *supra*, at 162-63, with Haddleton, *supra*, at 286. It merely adopts an approach that better effectuates the congressional intent in establishing the deduction and thus provides a sounder conceptual framework for analysis while following the ordinary meaning of language. Cf. 19 U. Chi. L. Rev. 534, 545 (1952); 49 Va. L. Rev., *supra*, at 163. We see no basis whatever for believing that when the 1921 Congress eliminated the requirement for determining the excess of the costs of meals

and lodging while on the road over what they would have been at home, it meant to disallow a deduction to someone who had the expense of maintaining a home from which business took him away but possessed no business headquarters. By the same token we find it impossible to read the words "away from home" out of the statute, as Rosenspan, in effect, would have us do and allow a deduction to a taxpayer who had no "home" in the ordinary sense. The limitation reflects congressional recognition of the rational distinction between the taxpayer with a permanent residence—whose travel costs represent a duplication of expense or at least an incidence of expense which the existence of his permanent residence demonstrates he would not incur absent business compulsion—and the taxpayer without such a residence. Cf. *James* v. *United States, supra,* 308 F.2d at 207. We fail to see how Rosenspan's occasional trips to New York City, assuming for the sake of argument that his "business headquarters" was in New York rather than in his sales territory, differentiate him economically from the homeless traveling salesman without even the modicum of a business headquarters Rosenspan is claimed to have possessed. Yet we approved disallowance of the deduction in such a case many years ago, *Duncan* v. *C.I.R.,* 17 B.T.A. 1088 (1929), *aff'd per curiam,* 47 F.2d 1082 (2 Cir. 1931), as the Ninth Circuit has done more recently, *James* v. *United States, supra,* 308 F.2d 204.

It is enough to decide this case that "home" means "home" and Rosenspan had none. He satisfied the first and third conditions of *Flowers, supra,* 326 U.S. at 470, but not, on our reading of the statute, the second. The judgment dismissing the complaint must therefore be affirmed.

Appendix A

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of February one thousand nine hundred and seventy-one.

Present:

Hon. STERRY R. WATERMAN,
Hon. HENRY J. FRIENDLY,
Hon. IRVING R. KAUFMAN, Circuit Judges.

ROBERT ROSENSPAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix A

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

Appendix B

Opinion of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 69-C-174

Decided, March 25, 1970

ROBERT ROSENSPAN,

Plaintiff,

against

UNITED STATES OF AMERICA,

Defendant.

Appearances:

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Appendix B

ROSLING, J.

Plaintiff, Rosenspan, a traveling salesman, seeks refund of federal income tax and accrued interest allegedly overpaid by him for the years 1962 and 1964. For 1962 the excess was $1,209.86, and for 1964, $795.81. These sums were deducted by him on his returns as expenditures for food and lodging while in the sales territory assigned to him by his employers. He was then, so he contends, "away from home" within the meaning of Section 162(a)(2) of the Internal Revenue Code of 1954, ("IRC"). That provision as in effect for 1962 reads in pertinent part:

> "SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *"

As amended in a respect not here pertinent the provision applicable to 1964 reads:

> "(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * *
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts

which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; * * *"

Upon disallowance of the deduction plaintiff paid the tax, and now brings action for its recovery.

The facts have been stipulated. They are as follows:

Plaintiff's employers were jewelry manufacturers with headquarters in New York City. He worked in these offices five or six times a year for a total of 30 days. During the remainder of the year he traveled extensively within his assigned territory, calling upon retail jewelry stores in Ohio, Indiana, Michigan, West Virginia, Kentucky and western Pennsylvania. He traveled by automobile, stopping at motels or hotels, and usually spent not more than one or two nights in each city. Sometimes he used a convenient major city within his territory as a point from which to operate for a few days while visiting customers in nearby towns. He spent no substantial portion of the year in any one city in his territory and had no business post or station or permanent place of residence within the sales territory.

The plaintiff was a widower with adult married children who had established their own separate households. He himself had grown up in Brooklyn and while his wife was alive had maintained his family home there. From 1948 through the taxable years involved plaintiff used his brother's residence in Brooklyn as his "personal residential address." He kept some of his clothing and other personal belongings in his brother's home and registered and

voted from his address. His tax returns were filed from the address and he received his personal mail there. "Out of a desire not to abuse his welcome at his brother's home, he stayed more often at the Crossway Idlewild Inn near New York City's John F. Kennedy Airport."

His bank was in New York City, and he had been a member of a branch of the Workmen's Circle, namely Branch No. 1001, in New York City for many years. When in the city he attended meetings and functions of the branch in New York. He generally spent his annual vacations in Brooklyn where his children resided "and made an effort to return to Brooklyn whenever possible."

He supplied his employers with itineraries covering periods of two weeks or more, and the employer would forward business mail to him as he traveled. Checks for his drawings and commissions were deposited by the employer by mail in plaintiff's New York City bank account.

His business card carried the name and address of his employer in the city and as an accommodation to him by a Cincinnati customer, the address of such customer. He received some business mail from others than his employer at either his employer's address in New York, at his customer in Cincinnati, or at the home of a cousin in the latter city.

His automobile operator's licenses in 1962 and 1964 were issued by both Ohio and New York. His ownership license had prior to October 1961, been issued by the State of New York. On that date and thereafter through December 31, 1964, he registered his automobile with the State of Ohio in order to be able to maintain insurance

coverage in that state at a rate lower than it was obtainable in New York.

He had on his 1962 and 1964 returns deducted his expenses for transportation [to and from his sales territory] and for food and lodging while in the territory. The transportation had on audit been allowed; the food and lodging, disallowed.

The taxpayer's brief and reply brief overwhelm the Court with the number of cases cited in a comparatively simple situation where no case offered is squarely in point. The broad principles applicable are, however, fairly clear and the issue in this case, as it does in those cited, turns on the particular facts established.[1]

The rule is that the taxpayer's "home" for the purpose of the deduction under section 162(a)(2) is the business address of his employer. But the business address is used in the sense of a "basing point" for determination whether the taxpayer claiming the deduction is away from it when he incurs his expenses for transportation, food and lodging, rather than as a home where he eats and sleeps when he is not traveling. If, for example, he lives with his wife in Philadelphia, and sells in New York City where his employer is located, he is not "away from home" when he sells, for he is not then selling away from his basing point. The situation postulated, however, does not now concern us for the place of the employer's business and the residence of plaintiff's brother which he pro-

1. Commissioner v. Flowers, 326 U.S. 465, 470, 66 S. Ct. 250, 252 (1946) and cases cited therein.

poses as his home are both in the City of New York, while the sales territory is located in other states.[2]

Plaintiff's difficulty is, rather, that the Internal Revenue Service does not recognize that his brother's home is plaintiff's home at all. He does not duplicate his living expenses while he is on the road away from such residence, for he makes no claim that he pays any part of the expenses for its maintenance or his board and keep there. It is the government's position that if one is to be allowed the deduction for expenses while "away from home" he must fall in the class for which the IRS says the law was passed, namely, those who have homes with attendant and continuing expense while they travel and incur obligations for food and lodging on the road. As pointed out by the government, the deduction was originally permitted only for the excess above the taxpayer's simultaneous expenses at home, but when this provision was found too difficult and expensive for the Service to administer, it was con-

2. In Cockrell v. Commissioner, 321 F.2d 504, 507 (8th Cir. 1963), the court of appeals in its opinion declared the rule as follows:

> "The word 'home' as used in that section is to be given its ordinary meaning. In a tax sense it is referable to the place where one has his principal place of duty, and where he has an abode while pursuing such duty;—not where he merely claims his 'residence' to be. (Wright v. Hartsell, 305 F.2d 221 (9 Cir. 1962), and cases therein cited.) Ney v. United States, 171 F.2d 449 (8 Cir. 1948), cert. den. 336 U.S. 967, 69 S. Ct. 940, 93 L.Ed. 1119; Bercaw v. Commissioner, 165 F.2d 521 (4 Cir. 1948); Barnhill v. Commissioner, 148 F.2d 913, 159 A.L.R. 1210 (4 Cir. 1945). 'The job, not the taxpayer's pattern of living,' is the crucial matter. Carragan v. Commissioner, 197 F.2d 246, 249 (2 Cir. 1952); O'Toole v. Commissioner, 243 F.2d 302, 303 (2 Cir. 1957)."

Cf. Wills v. Commissioner, 411 F.2d 537, 540 (9th Cir. 1969); Raymond E. Kershner, 14 T.C. 168 (1950).

verted by Congress at the request of IRS into a deduction for the full amount of meals and lodging purchased by the taxpayer while traveling on the employer's business.[3]

The courts have recognized that the present provision does not equitably accommodate every situation, allowing some taxpayers greater, and others lesser, deductions than they might upon an exact calculation be held entitled to.[4] The inadequacies and unfairness of the deduction, though noted by the Court, are for the Congress and the Commissioner, and not for the Court to correct. These inadequacies reflect a congressional effort to eliminate an impossibly burdensome record-keeping requirement imposed on the taxpayer, claiming the deduction, coupled with the formidable administrative problem cast upon the Service as it sought to achieve exactitude in ruling on the propriety of the deduction.[5]

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3. See Revenue Act of 1918, ch. 18, §214(a), 40 Stat. 1066; Treas. Reg. 45, §214(a), amended, T.D. 3101, 3 Cum. Bull. 191 (1920); Act of Nov. 23, 1921, ch. 136, §214(a)(1), 42 Stat. 239, which became part of the Revenue Act of 1921 and furnishes the forerunner of the present provision.

4. Commissioner v. Stidger, 386 U.S. 287, 87 S. Ct. 1065 (1967).

5. T.D. 3101, 3 Cum. Bull. 191 (1920) amending Article 292 of Treasury Regulations 45, effective January 1, 1921, in permitting a deduction for the traveling expenses created the record-keeping difficulty by limiting the deduction to "meals and lodging in an amount in *excess* of any expenditures ordinarily required for such purposes when at home." Plaintiff's brief (p. 10), correctly notes that "[t]his rule proved so difficult to administer that the Treasury Department asked Congress to grant a deduction for the 'entire amount' of such meal and lodging expenditures. Congress complied by enacting section 214(a)(1) of the Revenue Act of 1921, 42 Stat. 239, which authorized deduction of 'traveling expenses (including the *entire* amount expended for meals and lodging while away from home in pursuit of a trade or business * * *.'" [Emphasis of the words "excess" and "entire" supplied to indicate the force of the amendment.]

Appendix B

With the history of the provision to guide us, we, therefore, conclude that the IRS is justified in requiring of the taxpayer that he support his claim by showing that he has a sleep-in, eat-in home, on a year-round or at least permanent basis of expense to him while he incurs on his travel trips the duplicative temporary expense of food and lodging.[6]

Applying the principle to the instant facts, we find as the most significant circumstance the complete absence of any payments by the taxpayer whether year-round or partial to his brother for food and lodging at the brother's "home" which the plaintiff claims as his own.

The foregoing decision constitutes the findings of fact and the conclusions of law of the Court.

Complaint dismissed on the merits.

GEORGE ROSLING
U. S. D. J.

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6. See James v. United States, 176 F. Supp. 270, 272 (D. Nev. 1959), aff'd, 308 F.2d 204 (9th Cir. 1962), which, after the decision in Commissioner v. Stidger, 386 U.S. 287, 87 S. Ct. 1065 (1967), was modified in its holding by Wills v. Commissioner, 411 F.2d 537 (9th Cir. 1969), aff'g 48 T.C. 308 (1967). Wills did not, however, recede from the holding in the earlier James case that it was necessary that an abode be maintained by the taxpayer on a permanent basis to qualify him for the deduction. See also Commissioner v. Mooneyhan, 404 F.2d 522, 527 (6th Cir. 1968), cert. denied 394 U.S. 1001 (1969); Scotten v. Commissioner, 391 F.2d 274 (5th Cir. 1968), aff'g 25 CCH Tax Ct. Mem. 1054 (1966); Cockrell v. Commissioner, 321 F.2d 504, 507 (8th Cir. 1963); Vincent P. McKilligan, 27 CCH Tax Ct. Mem. 1045 (1968); Kenneth H. Hicks v. Commissioner, 47 T.C. 71 (1966); Leo M. Verner, 39 T.C. 749 (1963).